

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MANAL JAMIL,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

NO. CV 12-8474 AGR

MEMORANDUM OPINION AND
ORDER

Plaintiff Manal Jamil filed this action on October 5, 2012. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 7, 15.) On June 17, 2013, the parties filed a Joint Stipulation ("JS") that addressed the disputed issues. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the decision of the Commissioner is reversed and remanded for further proceedings so that Defendant may reassess Jamil's physical residual functional capacity in light of medical records submitted to the Appeals Council.

I.

PROCEDURAL BACKGROUND

On May 29 and June 2, 2009, respectively, Jamil filed applications for supplemental security income and disability insurance benefits, alleging an onset date of July 17, 2008. Administrative Record ("AR") 27. The applications were denied. AR 27, 80-81. Jamil requested a hearing before an Administrative Law Judge ("ALJ"). AR 90-91. On July 29, 2010, the ALJ continued the hearing to review additional evidence and obtain a medical expert. AR 49-50. On December 6, 2010, the ALJ conducted a supplemental hearing at which Jamil, a medical expert and a vocational expert testified. AR 51-79. On February 3, 2011, the ALJ issued a decision denying benefits. AR 24-42. On August 6, 2012, the Appeals Council denied the request for review. AR 1-5. This action followed.

II.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this court reviews the Commissioner's decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

"Substantial evidence" means "more than a mere scintilla but less than a preponderance – it is such relevant evidence that a reasonable mind might accept as adequate to support the conclusion." *Moncada*, 60 F.3d at 523. In determining whether substantial evidence exists to support the Commissioner's decision, the court examines the administrative record as a whole, considering adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than one rational interpretation, the court must defer to the Commissioner's decision. *Moncada*, 60 F.3d at 523.

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28**III.**
DISCUSSION**A. Disability**

A person qualifies as disabled, and thereby eligible for such benefits, “only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

B. The ALJ’s Findings

The ALJ found that Jamil met the insured status requirements through December 30, 2009. AR 29.

Following the five-step sequential analysis applicable to disability determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),¹ the ALJ found that Jamil has the following medically determinable impairments: degenerative disc disease of the lumbar spine, degenerative disc and joint disease of the cervical spine, bilateral carpal tunnel syndrome status post surgery on the left hand, osteoarthritis of the wrists and hands bilaterally, hypothyroidism, chronic headaches, obesity and major depressive disorder. AR 30. Her impairments do not meet or equal any listed impairment, including 1.04, 11.14 or 12.04. AR 30-32.

Jamil had the residual functional capacity (“RFC”) to perform light work except she can sit, stand and walk for six hours in an eight-hour workday; occasionally push and pull with her upper and lower extremities; occasionally

¹ The five-step sequential analysis examines whether the claimant engaged in substantial gainful activity, whether the claimant’s impairment is severe, whether the impairment meets or equals a listed impairment, whether the claimant is able to do his or her past relevant work, and whether the claimant is able to do any other work. *Lounsbury*, 468 F.3d at 1114.

1 engage in postural activities; occasionally handle and finger; cannot climb
2 ladders, ropes or scaffolds; must avoid unprotected heights, hazardous
3 machinery and temperature extremes; and can perform only simple, repetitive
4 tasks. AR 33. She is unable to perform any past relevant work, but there are
5 jobs that exist in significant numbers in the national economy that she can
6 perform such as conveyor belt baker worker, counter clerk and furniture rental
7 clerk. AR 40-42.

8 **C. New Evidence Submitted to Appeals Council**

9 After the ALJ's decision, Jamil submitted the medical records in Exhibits
10 27F-30F. Exhibits 27F-30F consist of records from Burbank Advanced Imaging,
11 dated July 15, 2008 to January 10, 2011; records from Glendale Memorial
12 Hospital, dated September 13, 2010 to January 20, 2012; a mental evaluation
13 form from Dr. Gevorkian dated March 9, 2011; and physical capability evaluation
14 forms from Ms. Melkonova, PPT, dated March 16 and 21, 2011. AR 583-640.

15 The Appeals Council considered the exhibits, made them part of the record
16 and found no basis for changing the ALJ's decision. AR 1-2, 5.

17 Taking the new exhibits into account, Jamil argues that she "may meet or
18 equal Social Security listing 1.04" and that "the ALJ's decision is not supported by
19 substantial evidence, as this new evidence bolsters all of her contentions of
20 disability at the hearing level." JS 3-5, 9.

21 The reviewing court's role is "to determine whether, in light of the record as
22 a whole, the ALJ's decision was supported by substantial evidence and was free
23 of legal error." *Taylor v. Comm'r*, 659 F.3d 1228, 1232 (9th Cir. 2011). The
24 reviewing court considers both the ALJ's decision and the additional material
25 submitted to the Appeals Council. *Brewes v. Comm'r*, 682 F.3d 1157, 1163 (9th
26 Cir. 2012). To warrant remand, Jamil must demonstrate "a 'reasonable
27 possibility' that the new evidence would have changed the outcome of the
28 administrative hearing." *Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001).

1 Dr. Gevorkian's mental evaluation form (Exhibit 29F) does not warrant
2 remand. The ALJ rejected Dr. Gevorkian's letter because the record did not
3 contain any mental health treatment records with Dr. Gevorkian or any other
4 psychiatrist or psychologist. AR 38. The ALJ's finding remains supported by
5 substantial evidence taking into account the new exhibit. Jamil did not submit
6 any treatment records from Dr. Gevorkian or anyone else. Jamil submitted only a
7 check-the-box form from Dr. Gevorkian that did not contain any explanation for
8 the limitations assessed in the form. AR 631-32; *Batson v. Comm'r*, 359 F.3d
9 1190, 1195 (9th Cir. 2004) (ALJ properly rejected treating physician's conclusory
10 check-list report); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (ALJ may
11 reject check-off reports that did not contain explanations for conclusions).

12 With respect to the newly submitted physical evidence, the Commissioner
13 argues that the imaging results "are comparable to prior imaging results and do
14 not change the weight of the evidence which the ALJ considered." JS 8. The
15 Commissioner further argues that a physical therapist is not an acceptable
16 medical source.

17 The new exhibits include an operative report from Glendale Memorial
18 Hospital dated January 18, 2012. AR 594. Jamil had anterior C5-6 and C6-7
19 disectomy/decompressions and intervertebral fusions with PEEK spacers,
20 autogenous local bone graft, calcium phosphates, and anterior plating. AR 594.
21 C5-6 and C6-7 disk material was sent to pathology, which showed extensive
22 degenerative change. AR 594, 596. The new exhibits contain post-surgical
23 radiological studies.

24 The 2012 operative report post-dates the ALJ's decision dated February 3,
25 2011. However, the treatment records leading up to the surgery indicate that
26 remand is appropriate for the ALJ to evaluate the new treatment records and
27 determine Jamil's medical condition as of January 2011. The ALJ noted that the
28 objective findings in the record before him at the time indicated conservative

1 treatment and no radiculopathy, disc bulges, herniation, or serious degeneration.
2 AR 34-35.

3 The new exhibits include a MRI of the lumbar spine dated January 10,
4 2011, which is compared to the MRI dated October 16, 2008 reviewed by the
5 ALJ. AR 584-85; *compare* AR 34, 485-86. The findings at L4-L5 are
6 comparable. AR 486, 584. At T12-L1, the 2008 study indicated “dessication and
7 endplate changes with a disc osteophyte extending centrally posteriorly,k and
8 inferiorly beneath the disc space, lodged centrally behind the L1 vertebral body
9 with mild central canal stenosis.” AR 485. The 2011 study showed desiccated
10 disc space and a central extruded and sequestered disc herniation which is
11 migrated inferior to this level for a length of 1 cm. “This is more accentuated than
12 was present in comparison to the previous study. There is however no
13 compromise of the conus medullaris. There is no foraminal stenosis.”² AR 584.

14 The new exhibits include a MRI of the cervical spine dated January 10,
15 2011. AR 586-87. The 2008 MRI of the cervical spine indicated 2-3 mm
16 posterior disc bulges at C5-6 and C6-7 elevating the posterior longitudinal
17 ligaments exacerbated by disc desiccation and spondylosis deformans, and 1-2
18 mm posterior disc bulge at C4-5 elevating the posterior longitudinal ligament
19 exacerbated by disc desiccation. AR 268. By contrast, the 2011 MRI of the
20 cervical spine showed: (a) at C6-7, a 4 mm left paracentral extruded disc
21 herniation, the rostral-to-caudal extent is 5 mm, and significant flattening of the
22 left paramedian ventral cord with moderate stenosis; (b) at C5-6, a 3 mm right
23 lateral extruded disc herniation, the rostral-to-caudal extent is 5 mm, and
24 significant flattening of the right ventral lateral aspect of the cord and moderate
25 spinal stenosis; and (c) at C4-5, a 2 mm central protrusion with minimal flattening

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27 ² The 2011 study also showed, at L3-4, a 2 mm far left lateral bulge in
28 annulus without central or significant foraminal stenosis and minimal left
subarticular lateral recess compromise. AR 584. This finding was not included in
the impression.

1 of the ventral cord. AR 586.

2 The new exhibits contain a report from Dr. Salem, a neurosurgeon, on
3 February 10, 2011, shortly after the date of the ALJ's decision. AR 613-15. Jamil
4 reported "no change in her symptoms." AR 613. Dr. Salem reviewed the MRIs of
5 the lumbar and cervical spine, and examined Jamil.³ AR 613-14. Dr. Salem
6 diagnosed lumbar spine mechanical pain with radiculopathy, cervical spine
7 mechanical pain with radiculopathy and bilateral carpal tunnel syndrome. AR
8 614. Dr. Salem stated that Jamil "is a candidate for anterior cervical
9 decompression and fusion C5 through C7," and "a candidate for lumbar spine
10 fusion L4-L5." AR 614-15. Jamil "may also need a posterior cervical spine
11 decompression and fusion at a later date." AR 614.

12 Accordingly, this matter is remanded to the Commissioner for consideration
13 of Jamil's physical impairments in light of the new exhibits.⁴

14 **D. The ALJ's RFC Determination**

15 Jamil contends the ALJ erred in not including all her limitations in her RFC.
16 She claims the ALJ failed to account for her need to lie down during the day,
17 antalgic gait, anxiety, neuropathy, and headaches.

18 The RFC determination measures the claimant's capacity to engage in
19 basic work activities. *Bowen v. New York*, 476 U.S. 467, 471, 106 S. Ct. 2022,
20 90 L. Ed. 2d 462 (1986). The RFC assessment is a determination of "the most
21 [an individual] can still do despite [his or her] limitations." 20 C.F.R. §
22 404.1545(a). It is an administrative finding, not a medical opinion. 20 C.F.R. §
23 404.1527(e)(2). The RFC takes into account both exertional limitations and
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25 ³ Jamil states that Dr. Salem is a treating neurosurgeon.

26 ⁴ The Commissioner argues that Ms. Melkonova is not an acceptable
27 medical source. On remand, the Commissioner is correct that physical therapists
28 are not "acceptable medical sources," but are considered "other source" opinions
that an ALJ may discount if he or she provides germane reasons for doing so.
Turner v. Comm'r of Soc. Sec. Admin., 613 F.3d 1217, 1224 (9th Cir. 2010).

1 non-exertional limitations. "When there is conflicting medical evidence, the
2 Secretary must determine credibility and resolve the conflict." *Thomas*, 278 F.3d
3 947, 956-57 (citation omitted).

4 The ALJ's RFC determination was that Jamil could perform light work,
5 except she can sit, stand, and walk for six hours in an eight-hour workday; can
6 occasionally push and pull with her upper and lower extremities; can occasionally
7 engage in postural activities; can occasionally handle and finger; cannot climb
8 ladders, ropes or scaffolds; must avoid unprotected heights and hazardous
9 machinery; must avoid temperature extremes; and can perform only simple,
10 repetitive tasks. AR 33.

11 **1. Mental RFC**

12 Substantial evidence supports the ALJ's mental RFC determination that
13 Jamil could perform simple, repetitive tasks. Jamil argues that anxiety disorder
14 was diagnosed by her treating providers. The ALJ cited Dr. Gevorkian's letter,
15 dated July 11, 2009, in which Dr. Gevorkian noted the diagnoses of major
16 depression, anxiety disorder, and post traumatic stress disorder. AR 38, 481.
17 The ALJ discounted Dr. Gevorkian's letter because the record lacked evidence of
18 any mental health treatment. AR 38, 481. The ALJ noted that Jamil had no
19 history of psychiatric hospitalization. AR 38.

20 The ALJ cited the findings of Dr. Staub, who performed a complete
21 psychiatric evaluation on July 31, 2009. AR 37, 439-45. Dr. Staub found Jamil
22 coherent and organized with no tangentiality or loosening of associations;
23 relevant and non-delusional; alert and oriented to time, place, person and
24 purpose; and at least of average intelligence with no apparent problem with
25 memory or intellectual functioning. AR 37, 442-44. Dr. Staub found Jamil to be
26 "functioning adequately from a psychiatric perspective," and gave her a global
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1 assessment of functioning (“GAF”) score of 65.⁵ AR 37, 444-45. Moreover,
2 records indicated that in April 2008, Jamil showed no apparent problems with
3 cognition, no suicidal or homicidal ideation, and no evidence of hallucinations or
4 delusions. AR 37, 357-58. In May 2008, Jamil presented as grossly intact in all
5 spheres of cognition. AR 37, 309. In December 2008, Jamil was oriented to
6 person, place, time, and current events. AR 37, 255.

7 As discussed above, the ALJ’s mental RFC determination remains
8 supported by substantial evidence even in light of Dr. Gevorkian’s March 2011
9 opinion.

10 **2. Physical RFC**

11 Because this matter is being remanded for consideration of the new
12 exhibits regarding Jamil’s physical impairments, the ALJ is free to reconsider the
13 physical RFC on remand.

14 **E. Credibility**

15 Jamil contends the ALJ improperly discounted her credibility.

16 “To determine whether a claimant’s testimony regarding subjective pain or
17 symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter*,
18 504 F.3d at 1035-36. At step one, “the ALJ must determine whether the claimant
19 has presented objective medical evidence of an underlying impairment ‘which
20 could reasonably be expected to produce the pain or other symptoms alleged.’”
21 *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)).
22 The ALJ found that Jamil’s medically determinable impairments could reasonably
23 be expected to produce the alleged symptoms. AR 33.

24 “Second, if the claimant meets this first test, and there is no evidence of
25 malingering, the ALJ can reject the claimant’s testimony about the severity of her
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27 ⁵ A GAF of 65 indicates mild symptoms. See American Psychiatric
28 Association, *Diagnostic and Statistical Manual of Mental Disorders* 34 (4th ed.
Text Revision 2000).

1 symptoms only by offering specific, clear and convincing reasons for doing so.”
2 *Lingenfelter*, 504 F.3d at 1036 (citation and quotation marks omitted). “In making
3 a credibility determination, the ALJ ‘must specifically identify what testimony is
4 credible and what testimony undermines the claimant’s complaints[.]’” *Greger v.*
5 *Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (citation omitted). The ALJ found that
6 Jamil’s statements concerning the intensity, persistence and limiting effects of the
7 alleged symptoms were not credible to the extent they were inconsistent with the
8 RFC assessment. AR 33.

9 In weighing credibility, the ALJ may consider factors including: the nature,
10 location, onset, duration, frequency, radiation, and intensity of any pain;
11 precipitating and aggravating factors (e.g., movement, activity, environmental
12 conditions); type, dosage, effectiveness, and adverse side effects of any pain
13 medication; treatment, other than medication, for relief of pain; functional
14 restrictions; the claimant’s daily activities; and “ordinary techniques of credibility
15 evaluation.” *Bunnell*, 947 F.2d at 346 (citing SSR 88-13) (quotation marks
16 omitted). The ALJ may consider (a) inconsistencies or discrepancies in a
17 claimant’s statements; (b) inconsistencies between a claimant’s statements and
18 activities; (c) exaggerated complaints; and (d) an unexplained failure to seek
19 treatment. *Thomas*, 278 F.3d at 958-59.

20 The ALJ discounted Jamil’s credibility based on poor effort during
21 consultative examinations, sporadic work history and daily activities. AR 34.

22 An ALJ may rely on lack of cooperation or poor effort during examinations
23 to discount a claimant’s credibility. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th
24 Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). The ALJ
25 noted that Dr. Staub found Jamil to be not cooperative, genuine or truthful at her
26 psychiatric examination. AR 34, 442. The ALJ noted that Jamil had zero grip
27 strength upon physical examination, yet was able to perform light dusting and
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1 shop for groceries.⁶ AR 34, 215-16, 450. Inconsistencies between reported
2 symptoms and activities support an adverse credibility finding. See *Berry v.*
3 *Astrue*, 622 F.3d 1228, 1235 (9th Cir. 2010). An ALJ may rely on poor work
4 history to discount a claimant's credibility.⁷ See *Thomas*, 278 F.3d at 959. "If the
5 ALJ's credibility finding is supported by substantial evidence in the record, we
6 may not engage in second-guessing." *Id.*

7 **F. Lay Witness Testimony**

8 Jamil contends the ALJ improperly discounted her son's testimony.

9 "In determining whether a claimant is disabled, an ALJ must consider lay
10 witness testimony concerning a claimant's ability to work." *Stout v. Comm'r of*
11 *Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006). "When an ALJ discounts
12 the testimony of lay witnesses, 'he [or she] must give reasons that are germane
13 each witness.'" *Valentine v. Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th
14 Cir. 2009) (citation omitted).

15 Jamil's son, Ziad Jamil, submitted a Function Report – Adult – Third Party,
16 dated June 29, 2009. AR 205-12. The ALJ noted Mr. Jamil's cumulative
17 observations that Jamil had difficulty lifting, walking, climbing stairs, squatting,
18 sitting, bending, kneeling, standing, talking, using her hands, reaching, using her
19 memory, completing tasks, concentrating, understanding, following instructions,
20 and in getting along with others. AR 39, 210. The ALJ gave Mr. Jamil's report
21 "little weight" and found that it conflicted with the observations of the consultative
22 physicians and medical expert. AR 39. The ALJ did not err. see *Valentine*, 574
23 F.3d at 694 (ALJ may properly reject cumulative lay witness testimony when ALJ
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25 ⁶ At the hearing, Jamil testified that "I can't do anything." AR 64.

26 ⁷ The ALJ noted that Jamil came to the United States in 1994 and did not
27 start working until 2002. AR 34. Jamil points to her testimony that she attended
28 a community college but left without getting an Associates Degree, which is a
two-year degree. AR 56-57. There is no indication that community college
consumed eight years.

1 gives clear and convincing reasons for rejecting claimant's testimony).

2 **IV.**

3 **ORDER**

4 IT IS HEREBY ORDERED that the decision of the Commissioner is
5 reversed and this matter is remanded for further proceedings so that Defendant
6 may reassess Jamil's physical residual functional capacity in light of medical
7 records submitted to the Appeals Council.

8 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and
9 the Judgment herein on all parties or their counsel.

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11 DATED: November 21, 2013


ALICIA G. ROSENBERG
United States Magistrate Judge